by the respondent (a) that the appellant as Administratrix of the Estate of Mat bin Jusoh (deceased) hold deceased's share in certain lands as trustee thereof for and on behalf of the respondent and (b) that the respondent is entitled to possession of those portions occupied by him since March 1, 1952 pursuant to an agreement of sale between the respondent as purchaser and the deceased as vendor.

An agreement of sale is set out at pages 51-52 of the Record. The appellant, while disclaiming knowledge of it, contends that as it is admitted that the respondent at the date of the agreement, was incompetent to contract, having been born on March 31, 1937, it is null and void, and no specific performance based thereon can be decreed. The Privy Council in *Mohori Bibee* v. *Dhumodas Ghose*[1] ruled that "the (Indian Contracts) Act makes it essential that all contracting parties should be competent to contract" and specifically enacts that a person incompetent to contract by reason of infancy cannot make a contract within the meaning of the Act. Our Contracts Act, 1950 is *in pari materia* with the Indian Contracts Act (see sections 10 and 11). The learned judge accordingly held, following *Suraj Narain Dube* v. *Sukhu Aheer & Anor.*[2] the agreement of March 1, 1952 to be void and no specific performance can be ordered on the agreement as an agreement for sale.

However, he went on to hold that the purchase price having been paid in full and the respondent let into possession, a constructive trust had been created and the deceased held the lands in trust for the respondent. With respect, to import a constructive trust in the present instance and grant a declaration that the appellant as Administratrix of Mat bin Jusoh, deceased, held deceased's share as Trustee thereof for and on behalf of respondent and that respondent is entitled to possession of the portions occupied pursuant to the agreement and order such trust to be specifically performed is in effect to enforce an agreement which is void *ab initio*.

We, therefore, allowed the appeal and set aside the order of the learned judge. We ordered the appellant to repay the $5000/- purchase price on the respondent's vacating the lands occupied by him, pursuant to section 66 of the Contracts Act. The deposit to be refunded to the appellant. We made no order as to costs.

Appeal allowed.

Solicitors: *Oo Gin Sun, Bakar & Co.; Lee Kok Liang.*

DIRECTOR-GENERAL OF INLAND REVENUE v. LAHAD DATU TIMBER SDN. BHD.

[F.C. (Lee Hun Hoe C.J. (Borneo), Ong Hock Sim F.J. and Charles Ho J.) (October 3 and December 29, 1977]

[Kota Kinabalu — Federal Court Civil Appeal No. 106 of 1976]

Revenue Law — Income tax — Profits from extraction of timber — Agency fee — Timber profits tax — Finding of fact by Special Commissioners — Deductions for development cost, planting payments and commission — Income Tax Act, 1967, ss. 33(1) and 39(1)(g) — Supplementary Income Tax Act, 1967, s. 20.

Timber — Extraction — Agency fee — Timber profits tax.

In this case the facts were that a parcel of state land of approximately 4,364 acres was alienated to a co-operative society for agricultural development. The society was also given a timber licence with rights to extract, remove and sell the timber. The society entered into an agreement with the respondents whereby the respondents undertook to fell and cut the timber and to sell and export it. The respondents in turn entered into an agreement with Yong Brothers under which they were to fell the timber and remove and sell them. The proceeds of sale were to be collected by Yong Brothers. After they had deducted the extraction charges of 82 cts. per cubic foot and the commission on sale of 2% they would pay the balance to the respondent.

In the accounts for the year ending 31st December 1968 (year of assessment 1969) the respondents showed the receipt of "agency fee" as follows:—

Proceeds from sale of timber		$1,789,645.59
Less		
Royalty	$300,380.69	
Fixed Commission paid to society	140,175.54	
Extraction fee at $1.00 per cubic foot	686,775.70	
Planting payments	201,000.00	
Development cost	158,000.00	1,486,331.93
		$ 303,313.66

The two issues before the Special Commissioners were (1) whether the sum of $303,313.66 described as "agency fee" was liable to timber profits tax and (2) whether the three sums described as development cost, planting payments and commission were allowable deductions in ascertaining the adjusted income of the respondent. They held that the sum of $303,313.66 described as "agency fee" was liable to timber profits tax under section 20 of the Supplementary Income Tax Act, 1967. They found that the respondent company did not carry out an agency business but what happened was that the rights under the licence were assigned by the society to the respondents. The Special Commissioners also found that the three sums claimed as deductions were not expenses wholly and exclusively incurred in the production of the gross income of the respondent. They said the three sums were paid for the use of the licence or permit to extract timber within the meaning of section 39(1)(g) of the Income Tax Act, 1967.

On appeal the learned trial judge held that the inference drawn by the Special Commissioners in the assignment of rights under the licence was not supported by the evidence and that therefore the "agency fee" was not assessable as a timber profits tax. He also held that the two sums described as "development cost" and "planting payments" were outgoings and expenses wholly and exclusively incurred in the production of the gross income of the respondent company and therefore deductible. On appeals to the Federal Court,

Held: (1) the learned trial judge was wrong to interfere with the decision of the Special Commissioners on the facts as there was sufficient evidence to support their conclusion;

(2) on the evidence it could not be said that the Special Commissioners had come to a wrong decision in law;

(3) the appeal must therefore be allowed and the decision of the Special Commissioners confirmed.

Cases referred to:-

(1) *Shadford (H.M. Inspector of Taxes)* v. *H. Fairweather & Co. Ltd.* 43 T.C. 291.
(2) *Eames (H.M. Inspector of Taxes)* v. *Stepnell Properties Ltd.* 43 T.C. 678.
(3) *F.C.T.* v. *James Flood Pty. Ltd.* 5 A.I.T.R. 579.
(4) *Smart* v. *Commissioners of Inland Revenue* 29 T.C. 338, 344.
(5) *Director-General of Inland Revenue* v. *L.T.S.* [1974] 1 M.L.J. 187, 188-189.
(6) *Bracegirdle* v. *Oxley* [1947] 1 All E.R. 126, 127.
(7) *Edwards (H.M. Inspector of Taxes)* v. *Bairstow and Harrison* 36 T.C. 207.
(8) *Leeming* v. *Jones* (H.M. Inspector of Taxes) 15 T.C. 333.
(9) *U.H.G.* v. *Director-General of Inland Revenue* [1974] 2 M.L.J. 33, 37.
(10) *Great Western Railway Co.* v. *Bater* (1928) 8 T.C. 231, 244.

FEDERAL COURT.

Alauddin bin Dato' Mohamed Sheriff (Senior Federal Counsel) for the appellant.

Datuk Thomas Jayasuriya for the respondent.

Lee Hun Hoe C.J. (Borneo): This appeal against the decision of the learned judge centres round four sums of money described as agency fee ($303,313.66), development cost ($158,000), planting payments ($201,000) and commission ($140,175.54). The first three sums are under appeal by the appellant while the last is under cross-appeal by the respondent.

The facts as found by the Special Commissioners are fully set out in the case stated. For the purpose of this appeal I will outline some of the facts. In early 1966 a parcel of State land of approximately 4,364 acres was alienated to the Ulu Tungku Co-operative Land Development Society Ltd. ("the society") for the purpose of agricultural development. At the same time the society was granted a timber licence by the State Government with the rights to extract timber and thereafter remove and sell timber so extracted from the said land. The society did not carry out the agricultural development or extract timber by itself. On September 6, 1966 the society entered into an agreement described as "the timber extraction contract" with Dato Donald Stephens and Abdul Majid Khan bin Hj. Kalakhan who were the promoters of Lahad Datu Timber Sdn. Bhd., the respondent, which, however, were incorporated on December 10, 1966. The two promoters were also the only two subscribers to the Memorandum and Articles of Association of respondent company.

On June 13, 1967 respondent entered into two agreements with the society. The "first agreement" was merely described as an "agreement for timber extraction" whereby respondent undertook to fell and cut timber and remove the timber to the log pond at the rate of $1.00 per cubic foot to be paid by the society. The "second agreement" was described as an "agreement for timber export and execution of certain works" whereby respondent undertook to sell and export the timber delivered to the log pond, to pay royalties due to the State Government in respect of the timber and also to pay planting fees and fixed commission to the society. In addition, respondent undertook to execute certain works specified in the Schedule to the latter agreement at a total cost not exceeding $632,000. Both agreements were specified for a period of four years and, therefore, expired on June 13, 1971.

The respondent did not, however, intend to carry out the extraction, sale and export of the timber themselves. Consequently, on June 28, 1967 respondent entered into an agreement with Yong Brothers of Lahad Datu. Under the agreement Yong Brothers undertook to fell the timber and to remove them to the log pond at a fee of 82 cents per cubic foot. Also, Yong Brothers undertook to sell the timber at a commission of 2% of the proceeds of sale. Letters of Credit were opened in favour of Yong Brothers by the buyers. The proceeds of sale were collected by them. After they deducted the extraction charges of 82 cents per cubic foot and the sale commission of 2% they would pay the balance to respondent.

In the accounts for the year ending December 31, 1968 (Year of Assessment 1969) the profit and loss account of respondent shows the following income:—

(i) Agency fee	$303,313.66
(ii) Extraction charges received ...	686,775.70
(iii) Interest received	8,157.82
	$998,247.18

The agency fee of $303,313.66 is derived as follows:—

Proceeds from the sale of 686,775.7 cubic feet of timber		$1,789,645.59
Less		
Royalty	300,380.69	
Fixed commission paid to the society	140,175.54	
Extraction fee at $1.00 per cubic foot ...	686,775.70	
Planting payments ...	201,000.00	
Development cost ...	158,000.00	1,486,331.93
Agency fee earned		$ 303,313.66

The said proceeds of sale of $1,789,645.59 were, in fact, arrived at after deducting the sum of $36,651.52 which was paid to Yong Brothers and shown as commission paid to sub-contractor. This error was discovered during the hearing before the Special Commissioners. The sum was twice deducted, once in the computation of the proceeds of sale and again charged to the Profit and Loss Account. The parties agreed that this sum was incorrectly deducted and should, therefore, be added back to the agency fee. This would not affect the issues before the court.

There were two issues before the Special Commissioners. The first is whether the sum of $303,313.66 described as "agency fee" is liable to timber profits tax. The second is whether the three sums described as development cost ($158,000), planting payments ($201,000) and commission ($140,175.54) are allowable deductions in ascertaining the adjusted income of the respondent. They were unanimous that the sum of $303,313.66 described as "agency fee" was liable to timber profits tax under section 20 of the Supplementary Income Tax Act, 1967 (Act 54). This sum forms part of the gross income of the respondent from

timber operation and should be taken into account in the computation of gross income of respondent company for the year of assessment 1969. They found the gross income of respondent from timber operation for the relevant year of assessment to be $1,026,740.88 which is arrived at as follows:—

(a) agency fee	$ 303,313.66
(b) extraction fee	686,775.70
(c) commission paid — subcontractor	36,651.52
	$1,026,740.88

The Special Commissioners found that in ascertaining the adjusted income of respondent from timber operations for the relevant year of assessment three sums, namely:—

(i) Development cost	$158,000.00
(ii) Planting payments	201,000.00
(iii) Commission	140,175.54

paid by respondent to the society, were not outgoings or expenses wholly and exclusively incurred in the production of gross income of the respondent under section 33(1) of the Income Tax Act, 1967. They said the sums were in fact paid for the use of the licence or permit to extract timber within the meaning of section 39(1)(g) of the said Act and should not, therefore, be allowed as deductions. They also expressed the view that the three sums were paid to the society as consideration for assignment of the rights and privileges under the timber licence. Accordingly, they ordered (1) that the assessment of income tax in respect of the respondent for the year of assessment 1969, as contained in the notice of additional assessment dated July 17, 1971, be amended and (2) that the assessment of income tax in respect of the year of assessment 1969, as contained in the notice of additional assessment dated December 8, 1973, be confirmed.

The question of law for the opinion of the High Court is whether on the evidence the Special Commissioners have reached a correct decision in law. The learned judge held that the Special Commissioners were erroneous in points of law in arriving at their determination on both issues. Therefore, he held that:—

(1) the sum of $303,313.66 described as "agency fee" is not assessable as timber profits tax under section 20 of the Supplementary Income Tax Act, 1967 (Act 54); and

(2) the two sums of $158,000 and $201,000 described as "development cost" and "planting payments" respectively, are outgoings and expenses wholly and exclusively incurred in the production of gross income of respondent company and, therefore, deductible under section 33(1) of the Income Tax Act, 1967 (Act 53).

However, the learned judge confirmed the decision of the Special Commissioners in respect of the sums of $36,651.52 described as "commission paid to subcontractor" and $140,175.54 described as "commission paid to the society." Hence, the parties appealed.

As regards the first issue whether the sum of $303,313.66 which respondent claimed to be "agency fee" was so or not would depend upon the facts of the particular case. The Special Commissioners are judges of facts and entitled to look at the surrounding facts and circumstances. See *Shadford (H.M. Inspector of Taxes)* v. *H. Fairweather & Co. Ltd.*[1] and *Eames (H.M. Inspector of Taxes)* v. *Stepnell Properties Ltd.*[2] They found as a fact that respondent company did not carry out an agency business. The terms of the "agreement for timber export" do not seem to be compatible with an agency agreement. Instead of the agent getting his commission and paying the proceeds to the principal the agent seemed to keep the proceeds while the principal received the commission. The learned judge quite rightly pointed out that the Special Commissioners accepted the contention of the appellant that the two agreements of June 13, 1967 were designed for the purpose of avoiding tax and should, therefore, be treated as one as providing for one continuous process of activity of extracting and selling timber. But, he considered the Special Commissioners to be wrong, whether this was an inference of fact or law. He thought that the two agreements provided for different contracts of service and they were not inter-related as each was capable of existing by itself. He stated that there was no timber licence and it was wrong to assume there was. Even if there was such a licence he said that there was no evidence to show that rights under the licence were conferred on the respondent by the agreement. For these reasons he held that the inference drawn by the Special Commissioners on the assignment of rights under the licence was not supported by evidence.

The Special Commissioners found as a fact that the process of extraction and sale of the timber were in fact one continuous operation. It must be kept in mind that the Special Commissioners have before them not only the exhibits but also oral evidence. For however genuinely the agreements may have been drawn up by those responsible, evidence may show that in fact they do not truly indicate the nature of the relevant operations. Just because respondent called the sum "agency fee" it does not necessarily mean that the Special Commissioners must accept it to be such.

I think the learned judge was wrong to disturb the finding of the Special Commissioners on facts which were admitted and proved. One of these facts is that the society was granted a timber licence by the State Government with the rights to extract timber. The land was granted to the society for the purpose of agricultural development. A person may be granted a piece of land under the Land Ordinance but that does not entitle him to extract and sell timber from the land without a proper licence to be issued under section 24 of the Forest Enactment, 1968. Perhaps, no such licence would be necessary if he cuts the timber for his own use on the land. But, if he cuts and sells or exports the timber from the land without a proper licence he would be committing an offence under section 20 of the Forest Enactment.

There can be no dispute that the society held a timber licence issued under the Forest Enactment, 1968. Clause 5 of the "first agreement" provides that:—

"The Contractor's operations under this Agreement shall be conducted with due regard to the law, the conditions of the grant of the land to the Society and of the timber licence for

the extraction of timber and any instructions given by the Conservator of Forests or his officers, and the Contractor shall indemnify the Society against any breaches thereof and against any claims for damage or injury done to any person or property in the undertaking of its operations under this Agreement."

In short, the contractor (i.e. respondent) must not breach the conditions of the grant of the land to the society and also the conditions of the timber licence for extraction of timber granted to the society. He was also to obey the instructions of the Conservator of Forests or his officers. If there was no timber licence there was no necessity to drag in the Conservator or his officers. Again, Clause 8 of the "second agreement" is word for word the same as Clause 5 above. Further, Clause 9 of the agreement between respondent and Yong Brothers also provides that the sub-contractor, i.e. Yong Brothers should conduct the operations with regard to the conditions of the licence to extract and remove timber and were to obey instructions of the Conservator of Forests or his officers. It is difficult to see how any person could extract and sell timber without a proper licence under the Forest Enactment, 1968. Even counsel for respondent conceded that if a licence was issued it was only for the purpose of removal. That is not all. The accountants for respondent in reply to appellant's letter stated quite clearly in paragraph 10 as follows:—

"Copy of Licence under which timber is cut or extracted is not available in this office; it is with the Ulu Tungku Timber Co-operative Land Development Society Limited of Lahad Datu."

Under the two agreements the society, for monetary consideration, gave respondent the rights "to fell and cut timber" on the land and then "to sell and export" all timber extracted from the land. Respondent could only do these under the timber licence of the society. In this sense it can be said that the society has assigned the rights under the timber licence to respondent. One of the objects of respondent as stated in their Memorandum of Association was clearly:—

"(MM) To acquire and take over the timber extraction contract now being carried on in Mukim Tungku, Lahad Datu by virtue of an Agreement dated 6th September, 1966 and made between the Ulu Tungku Co-operative Land Development Society of Tungku, Lahad Datu of one part and Dato Donald Stephens and Majid Khan of the other part with a view thereto to adopt that Agreement and all or any of the assets and liabilities therein."

The object is clear. Respondent has stepped into the shoes of the society in connection with timber extraction and were to assume all assets and liabilities. The Special Commissioners quite properly pointed out that the agreement dated September 6, 1966 was not produced. Also, respondent did not make any formal resolution adopting the said agreement. However, before the Special Commissioners, Majid Khan testified that respondent was incorporated solely for the purpose of adopting the said agreement. But what were the arrangements embodied in that agreement? It was for respondent to produce the agreement as they were a party to it. Respondent cannot complain if an adverse inference was drawn. The respondent was incorporated on December 10, 1966. Nothing can be clearer than the objects mentioned earlier in their Memorandum of Association. Without acquiring the rights of the society under the licence respondent could not extract and sell the timber. Neither could respondent enter into the agreement with Yong Brothers.

This brings me to the second issue concerning the three sums, namely, $158,000 (development cost), $201,000 (planting payments) and $140,175.54 (fixed commission). In ascertaining the adjusted income of respondent, the Special Commissioners found that the three sums were not expenses wholly and exclusively incurred in the production of gross income of respondent under section 33(1) of the Income Tax Act, 1967. They said the three sums were paid for the use of the licence or permit to extract timber within the meaning of section 39(1)(g). The learned judge disagreed with the findings of the Special Commissioners in respect of the first two sums. He considered that the third sum (fixed commission) should be treated differently and held that this sum was clearly a payment made to the society for the exclusive purpose and, therefore, not deductible. Although appellant agreed that the learned judge was right in disallowing this sum he was not in entire agreement with the reasoning of the learned judge. Appellant contended that this sum should be treated in the same manner as the other two sums. On the other hand, respondent submitted that regarding the development cost there was already a liability to incur the expense to undertake works under clause 5 of the agreement for timber extraction. It was deductible regardless of the expenditure having been incurred. The liability had arisen and was not contingent. *F.C.T.* v. *James Flood Pty. Ltd.*[3] was cited in support. With regard to the planting payments and fixed commission it was contended that these sums were held by respondent as agent on behalf of the society. The planting payments were to be paid to any contractor authorised by the society and approved by the Director of Agriculture under clause 9(1) of the agreement for timber extraction. The fixed commission was to be paid to the society. It was submitted that the two sums were not the income of respondent and, therefore, not taxable as their income. Appellant pointed out that there was no evidence to show that these sums had actually been received by the society. Neither had actual planting been carried out to justify the planting payments. The Special Commissioners had examined all the exhibits and seen and heard the witness before they made their finding. The taxpayer and the Revenue had made their points. The Special Commissioners had considered their points and came to a certain conclusion. It would be a fallacy to say that the Special Commissioners must swallow everything a taxpayer says. As Croom-Johnson J. said in *Smart* v. *Commissioners of Inland Revenue*[4] at page 344:—

"... when the Commissioners have the evidence, not only are they not bound to swallow every word of it — that would indeed not be exercising a judicial function at all — but they have the further duty in a proper case of drawing those inferences from all the facts and circumstances before them which will enable them to come to what they think is a right and just conclusion."

The learned judge was of the view that the Special Commissioners had misdirected themselves in the interpretation of section 20 of the Supplementary Income Tax Act, 1967 (Act 54) and the application of section 39(1)(g) in relation to section 33(1) of the Income Tax Act, 1967 (Act 53) and in so doing they had arrived at wrong conclusion. The submission of appellant is that the Special Commissioners had not misdirected themselves but had applied the law correctly to the facts as found by them. Whether the payments were

paid for the use of licence or otherwise is a question of fact. The Special Commissioners were entitled to look at the surrounding facts and circumstances in determining the nature of these payments. Respondent maintained that the Special Commissioners had completely misunderstood the law. His contention is that section 39(1)(g) would only arise if the outgoing or expenses fall within section 33(1). If not, that is the end of the matter and section 39(1)(g) would have no application. Whether the sums are allowable deductions would depend on whether they are outgoing or expenses wholly and exclusively incurred in the production of gross income within the meaning of section 33(1). Even if they are allowable deductions under section 33(1), the court would have to decide whether or not the sums are disallowed under section 39(1)(g) being sums payable for the use of a licence to export timber. In respect of the fixed commission the Special Commissioners found as a fact that this sum was paid for the use of the licence and, therefore, should be disallowed under section 39(1)(g). The onus is on respondent to show that this payment is not made for the use of the licence. He has failed to do so. Despite the fact that the preamble of the agreement for timber extraction expressly stated that respondent was to sell the timber on behalf of the society the facts of the case indicated respondent was in fact the principal and the society the agent. For otherwise why should respondent pay the society fixed commission if it was not for the use of the licence to extract timber.

The preambles of both agreements are the same in that both state clearly that the society had been granted state land of approximately 4364 acres for purpose of agricultural development "with rights to extract and sell timber on the land and apply the proceeds thereof for development of the land." For all practical purposes the society had assigned the rights to respondent in consideration of certain monetary payments. In other words, respondent had stepped into the shoes of the society to do everything the society was supposed to do. Clause 2(2) of the "second agreement" says that the contractor "shall pay for the timber extracted and delivered to the log pond as may be due to any contractor from the society." The meaning is uncertain. Also, the price is not specified. Clause 3 states that it "shall be the duty of the contractor to find the best markets for the sale and export of the timber and to negotiate with buyers for the best price either in the name of the society or in the name of the contractor." Since the contractor was charged with the only duty to find the best markets for sale of timber and to negotiate for the best price, it is at least equivocal whether the contractor was retained as a salesman and, therefore, an agent or whether he had taken over, on payment, the ownership of the timber. The duty to find the best price for the purpose was presumably to ascertain the amount due to the society. Under clause 5 the contractor was to execute works specified in the schedule at a cost not exceeding $632,000. But again it is uncertain whether the costs of the works were to be paid by the society as employers to the contractor or to be paid for by the contractor as part of the consideration for working the timber concession. Clause 9(1) says the contractor shall pay to the society a sum of $587,000 assessed and required for planting 1724 acres and for maintenance, in instalments, so that the payment in any one year shall not exceed $198,000. But why? The District Officer's letter (see page 218 of Appeal Record) makes clear in paragraph 10 that the society has to deposit 75% of the timber profits in a special account with the Chartered Bank to be used for cultivation of the land and ancillary development works and the remaining 25% in a special maintenance account to be used for maintenance of the planted area. As the society had engaged a contractor to do all the works it would have to ensure the timber profits be so deposited. If it had assigned the benefits of the licence to another party, it would have to ensure that the assignee complied with this requirement, unless, of course, the requirement is a dead letter, as it would seem to be so. If it is not so, then why were the two agreements not shown to ensure compliance with the term of the licence said to be issued by the District Officer? I cannot see how a District Officer could issue a timber licence under the Forest Enactment, 1968.

I am inclined to accept the view of the Special Commissioners that the society had assigned the rights to respondent as correct on the facts. Otherwise, there was no reason for respondent to assume control of the whole assets and liabilities as stated in their Memorandum of Association. The control was directed to the realization of the society's timber concession and undertaking in respect of agricultural development. There is no evidence that respondent had divested or passed the control to the society. If the divesting or passing of control had taken place, then respondent, having made certain deductions, should not retain such deductions in their own hands. In the first place the deductions should have been handed over. In the second place the society would have to account for the deductions if such deductions were handed over. The overall effect is that when such deductions were made, but not handed over, then the respondent would have to account for the retention of such deductions to the satisfaction of the Inland Revenue.

The provisions of section 33(1) and section 39(1)(g) were discussed in *Director-General of Inland Revenue* v. *L.T.S.*[5] which was also cited by the learned judge. In that case Chang Min Tat J., as he then was, in his usual lucid style, stated:—

> "Section 39 refers to deductions that are not allowed. Sub-section (1) specifies such deductions. They include in sub-section (g) any sum payable otherwise than to a State Government for the use of a licence or permit. Sub-section (2) must with respect mean that the deductions allowed in section 33 as expenses wholly and exclusively mentioned in sub-sub-sections 39(1)(a) to (g).
>
> It therefore means that the sum paid by the taxpayer to the permit-holders is caught by sub-section (1)(g) of section 39 and is not deductible.
>
> It also means that the sum paid to the Government of the State of Kedah in respect of the royalties is deductible under the relief provided in 'otherwise than to a State Government' in this sub-section, as rightly conceded by Revenue."

The question of commission paid by the taxpayer to the permit-holders necessitated the interpretation of section 39 in conjunction with section 33. It was held that the commission paid to the permit-holders was not deductible as it was caught by section 39(1)(g). Respondent paid the Sabah Government royalty amounting to $300,380.69. They were entitled to re-

lief on this under section 39(1)(g). One does not pay for extraction of timber unless one holds a licence issued under the Sabah Forest Enactment, 1968. There is no provision in the Sabah Land Ordinance concerning payment of royalty. However, respondent could not claim for relief in respect of commission they paid to the society, the licence holder.

With respect, the learned judge was wrong to interfere with the decision of the Special Commissioners as there was sufficient evidence to support their conclusion. The learned judge, in exercising appellate jurisdiction, was not supposed to alter conclusion of facts simply because he feels that on the evidence the Special Commissioners should not have arrived at the conclusion of facts they did. In *Bracegirdle* v. *Oxley*[6] Lord Goddard C.J. made these observations:—

"It is, of course, said that we are bound by the findings of fact set out in the Case by the justices, and it is perfectly true that this court does not sit as a general court of appeal against justices' decisions in the same way as quarter sessions, for instance, sit as a court of appeal against the decisions of courts of summary jurisdiction. In this court we only sit to review the justices' decisions on points of law, being bound by the facts which they find, provided always that there is evidence on which the justices can come to the conclusions of fact at which they arrive."

The House of Lords in *Edwards (H.M. Inspector of Taxes)* v. *Bairstow & Harrison*[7] accepted that the inference of "trade" or "no trade" in a particular case was a question of fact but pointed out that the question of what the statute means by "trade" is a question of law. The learned judge considered that the Special Commissioners were wrong in their conclusion of fact. The question is whether their decision was unreasonable. The learned judge cannot disturb the finding of facts by the Special Commissioners however strongly he may have felt. In *Leeming* v. *Jones (H.M. Inspector of Taxes)*[8] Rowlatt J. remitted the case to the General Commissioners for a finding whether there was or was not a concern in the nature of trade. The case came back to him and he gave judgment in favour of appellant and respondent appealed. Although Rowlatt J. disagreed with the finding of the Commissioners he did not disturb their finding. Thus, Lord Hanworth M.R. said at page 346:—

"... I think he was right, for however strongly one may feel as to the facts, the facts are for the decision of the Commissioners. It would make an inroad upon their sphere if one were to say in a case such as the present that there could only be one conclusion. The Commissioners are far better judges of these commercial transactions than the courts, and although their attention has been drawn to what happened, they have in their final Case negatived anything in the nature of an adventure or trade."

As Lord Radcliffe said in *Edward's case*[7] at page 228:—

"I see nothing more than this in anything that was said in this House in *Leeming* v. *Jones*.[8] The only thing that I would deprecate is too much abbreviation in stating the question as by asserting that it is simply a question of fact whether or not a trade exists. It is not simply a question of fact. The true clue to the understanding of the position lies, I think, in recalling that the court can allow an appeal from the Commissioners' determination only if it is shown to be erroneous in point of law."

He concluded this judgment in these words:—

"As I see it, the reason why the courts do not interfere with Commissioners' findings or determinations when they really do involve nothing but questions of fact is not any supposed advantage in the Commissioners of greater experience in matters of business or any other matters. The reason is simply that by the system that has been set up the Commissioners are the first tribunal to try an appeal and in the interests of the efficient administration of justice their decisions can only be upset on appeal if they have been positively wrong in law. The court is not a second opinion, where there is reasonable ground for the first. But there is no reason to make a mystery about the subjects that Commissioners deal with or to invite the Courts to impose any exceptional restraints upon themselves because they are dealing with cases that arise out of facts found by Commissioners. Their duty is no more than to examine those facts with a decent respect for the tribunal appealed from, and, if they think that the only reasonable conclusion on the facts found is inconsistent with the determination come to, to say so without more ado."

However much one may disagree with the decision of the Special Commissioners one must accept their finding of facts. Where they made findings of primary facts it is not open to the High Court to challenge their accuracy. As Raja Azlan Shah F.J. in *U.H.G.* v. *Director-General of Inland Revenue*[9] rightly pointed out:—

"But where there is evidence to consider, the decision of the Special Commissioners is final, even though the court might not, on the materials, have come to the same conclusion. In treating the question I can desire no more apt exposition of the law than what is contained in Lord Atkinson's speech in *Great Western Railway Co.* v. *Bater*[10]:—

'Their (Commissioner's) determination of questions of pure fact are not to be disturbed, any more than are the findings of a jury, unless it should appear that there was no evidence before them upon which they, as reasonable men, could come to the conclusion to which they have come; and this, even though the Court of Review would on the evidence have come to a conclusion entirely different from theirs'."

For reasons given, I do not think it can be said that on the evidence the Special Commissioners have come to a wrong decision in law. Accordingly, I would allow the appeal of the appellant with costs and dismiss the appeal of the respondent with costs. Deposit to respondent on account of taxed costs.

Ong Hock Sim F.J. and **Charles Ho J.** concurred.

Appeal allowed.

Solicitors: *Jayasuriya, Kah & Co.*

NYAP KUI FAH v. LEN ON CONTRACTOR

[F.C. (Lee Hun Hoe C.J. (Borneo), Ong Hock Sim F.J. and Charles Ho J.) (October 3 and December 29, 1977]

[Kota Kinabalu — Federal Court Civil Appeal No. 3 of 1977]

Contract — Performance of contract — Extraction of timber logs from land — Possibility of performance.

Timber — Extraction — Contract — Performance.

The appellant by an agreement in writing subcontracted to the respondents who were logging contractors, the extraction of timber logs from an area of timber land. The respondents alleged that they had completed the removal of the timber from the land and the camp supervisor of the appellants had certified that all timber from the area had been extracted and those left unextracted were in an area not accessible by tractor. In a claim by the respondents for the payments due under the agreement the appellant counterclaimed for general damages on the ground that the respondents had not totally performed the contract. The learned trial judge dismissed the counterclaim and the appellant appealed.

Held: dismissing the appeal, the learned judge was correct in dismissing the counterclaim as the respondents had performed the contract, so far as it was possible.